IN THE SUPREME COURT OF THE

OCTOBER TERM, 1936

No. [illegible]

IVEY HODGES, Plaintiff in Error,

v.

THE STATE OF ALABAMA, Defendant in Error.

In Error to the Supreme Court of the State of Alabama.

Brief for defendant in error, by Messrs. [illegible],
Attorney General of Alabama.

IN SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

Number 407.

DAN RODGERS, *Plaintiff in Error,*

v.

THE STATE OF ALABAMA, *Defendant in Error,*

In error to the Supreme Court of the State of Alabama.

Brief for defendant in error, by Massey Wilson, Attorney General of Alabama.

STATEMENT OF FACTS.

The plaintiff in error was indicted in the City Court of Montgomery for murder. (R. p. 3). Before arraignment and plea to the merits plaintiff in error moved to quash the indictment, (R. p. 11-12) which motion was in the following language:

The State of Alabama, Montgomery County.
In the City Court of Montgomery, July Term, 1902.
The State of Alabama,
v.
Daniel Rodgers.

And now comes the said defendant, in his own proper person and moves the Court to set aside and quash the

indictment against him herein, for the following reasons and causes, to-wit:

Because he is a person of dark complexion and African descent, known as a negro, and in the selection and empanelment of the grand jury which found and presented the indictment against him herein, he has been denied the equal protection of the law, by the State of Alabama, guaranteed by the first section of the 14th amendment to the Constitution of the United States; and because, in the selection and empanelment of said grand jury, he was the victim of race prejudice and proscription, in that he, and all the members of his race in the State of Alabama, have been denied the right to vote, and have been deprived of the privileges of electors, previously enjoyed by them in the State of Alabama, by sections 180, 181, 183, 184, 185, 186, 187 and 188 of article 8 of the Constitution of Alabama, which went into effect November 28th, 1901, on account of their race, color and previous condition of servitude, contrary to the first section of the 15th amendment to the Constitution of the United States, in this ,to-wit:

That said sections of the said Constitution of Alabama were enacted for the avowed purpose of disfranchising the defendant and all the members of his race in the State of Alabama, on account of their race and color, and previous condition of servitude, and without disfranchising a single white man in the State of Alabama;

And because, said sections do, in themselves, single out and discriminate against the defendant and his race, and deny them the right to vote and become electors in the State of Alabama, granted to white persons, for no other reason than their race and color, and previous condition of servitude.

And because, subdivisions 1 and 2 of said section 180 of the Constitution of Alabama, are not such a statement of the qualifications of electors as are applicable to and attainable by all alike, regardless to race, color and previous condition of servitude, but on the contrary, discriminate against the defendant and the negroes of Alabama, because of their race, color and previous condition of servitude and because subdivision 3 of said section 180 is too loose and general, and is equivalent to investing the board of registrars with arbitrary power,

and because, said section 181 of the Constitution of Alabama, while it pretends to describe the qualifications of electors after January 1st, 1903, was in real truth intended to apply to the negroes of Alabama alone, and not to the white citizens of Alabama, and by the scheme of refusing to register practically all the negroes under the temporary plan, under section 180 of the Constitution, although qualified for registration under that section, while all white men were registered, the State of Alabama thereby forces the great body of the negro population to wait until section 181 comes into operation, so that they alone will be affected by it;

And because, the pretended right of appeal from the decision of the registrars given by said section 186 of the constitution of Alabama, was given to more effectually hinder and deny the negroes' right to vote in the State of Alabama, on account of their race and color, because the juries in the trial courts of Alabama are composed exclusively of white men, and all negroes are excluded therefrom on account of their race and color, although otherwise qualified for such service, and have been so excluded for a great many years; although the population of the State of Alabama is very nearly even as to the white and colored races, and although in about 20 counties of said State, the negroes outnumber the whites; and that negroes would encounter the same race prejudice and obtain the same results upon appeal as upon application to the board of registrars;

And because, in the administration of said sections the board of registrars of Montgomery county, Alabama, and the boards in all other counties of Alabama, have denied and refused to register all negroes applying to them, for no other reason than their race and color, except in a few instances which happened to suit their wishes, while all white men were registered; and that all negroes were required to produce the testimony of two white persons as to their character and qualifications, and said board refused to accept the testimony of any colored person while all white men were registered upon their application without any further proof of qualification than the oath of the applicant; so that the great body of the negroes of Alabama amounting to more than seventy-five thousand qualified persons have been disfranchised by the operation of said sections of said

constitution of Alabama, and defendant further says, that by reason of such proscription and disfranchisement and denial to him and his race the right to qualify as electors in the State of Alabama, that the members of his race are denied and deprived of all right and voice in the government of said county and State, and are taxed without any right to representation in the affairs of county and State, and are denied and deprived of all right to be drawn and selected on the grand jury which found and presented the indictment against him herein;

And the defendant further says, that the jury commissioners appointed to select the grand jury which found and presented the indictment against him herein, selected no person or persons of color, or of African descent known as a negro, to serve on said grand jury, but, on the contrary, did exclude from the list of persons to serve as such grand jurors, all colored persons, or persons of African descent known as negroes, although largely in the majority of the population in said Montgomery county, and although otherwise qualified to serve as such grand jurors solely on the ground of their race and color, and because they had been disfranchised and deprived of all rights as electors in the State of Alabama, by the provisions of sections 180, 181, 183, 184, 185, 186, 187, and 188 of article 8 of the new constitution of Alabama; and that said grand jury was composed exclusively of persons of the white race.

All of which the defendant is ready to verify.

his
Dan X Rogers.
mark

Sworn to and subscribed before me this 17th day of July, 1902.

H. H. Matthews,
Clerk City Court of Montgomery.

This motion was struck from the files upon the motion of the State, and to this action the plaintiff in error excepted.

After plaintiff in error had been arraigned and entered his plea of not guilty, and after a petit juror had been called and sworn to answer the questions touching his qualifications as a petit juror and after said juror had been accepted by the State, and tendered the plaintiff in error he moved to quash the panel of the petit jurors upon

substantially the same grounds as the motion to quash the indictment. (R. p. 13, 14 and 15.) The court overruled this motion to quash the venire of petit jurors, and to this action of the court the plaintiff in error duly excepted. The action of the court in denying these two motions,—the one to quash the indictment, and the other to quash the venire of petit jurors,—is the only matter in the record of which plaintiff in error complains.

BRIEF AND ARGUMENT.

1. The Supreme Court of Alabama decided that the motion to quash the venire of petit jurors came too late; that it should have been made before the formation of the petit jury had begun; and that not having been made until after the State had been required to pass upon a juror, and had selected such juror, the motion should not have been entertained, regardless of its merits.

The authorities cited by the court in support of its decision seems to abundantly support it.

In 12 Ency. Pl. & Pr. 424, it is said:

"Hence a motion to quash the array must be made as soon as the facts which warrant it become known, and it is generally held that the challenge or objection must be interposed before entering on the formation of the jury ....."

In Thomas v. State, 94 Ala. 74, the defendant moved in arrest of judgment on a ground going to the regularity of the service of the names of the jurors upon him. In the course of the opinion the court said:

"Had that motion been made before the trial was entered upon, it should, and doubtless would, have been sustained. Such motion, not raising the question of the guilt or innocence of the accused, should always be made before the trial on the merits is entered upon."

In Ryan v. State, 100 Ala. 105, 108, the court said:

"A motion was made to quash the special venire on the ground that the 'list of jurors served on the defendant failed to show what persons had been summoned to served as petit jurors for the second week of this term of the court, and the return of the sheriff on the venire for the second week showed that S. R. Harris and William Madison were not found, and their names were on the list served on the defendant for the trial of this cause.'

The facts thus stated in the motion were admitted to be true. The motion was denied. If it was made before the trial was entered upon it should have been granted. If made after the trial was entered upon it was properly overruled."

The motion of the plaintiff in error was in effect a challenge to the array, which should have been made before the selection of the jury was entered upon.

12 Ency. Pl. & Pr., 316;
1 Thompson on Trials, § 113;
Gardiner v. People, 6 Park. Cr. Rep. (N. Y. Supreme Ct.) 155, 199.

2. The question raised on the motion to quash the indictment was disposed of by the Supreme Sourt of Alabama on the ground of the prolixity of the pleading by which it was presented to the lower court. Section 3286 of the Code of Alabama reads as follows:

"If any pleading is unnecessarily prolix, irrelevant or frivolous, it may be stricken out at the costs of the party so pleading, on motion of the adverse party....."

Substantially the same provision as above is found in all of the previous Codes of Alabama since the first codification in 1852. This section has been many times acted upon by the courts of Alabama and pleading stricken out because not in conformity with it.

In Cotton v. Ward, 45 Ala. 359, 360, it is said:

"A party litigant may plead in answer to a suit against him as many several pleas as he may think necessary for his defense. But such pleas must be pleaded in the order prescribed by law, and they must not be unnecessarily prolix, irrelevant or frivolous; and in this State, they should conform substantially to the schedule of forms attached to the code. Otherwise, they may be stricken out at the cost of the party so pleading, on motion of the adverse party, or the count may refuse to strike out, and put the party to his demurrer."

And in Davis v. Louisville & Nashville Railroad Company, 108 Ala. 660, 662, the court used the following language:

"When a plea is frivolous, or unduly prolix, it may, on motion, stating the ground, be stricken from the file."

The State statute before referred to is merely declarative of the common law. As is said in 20 Enc. Pl. & Pr. 44, 45, "By virtue of the inherent power of a court to prevent an abuse of its process, a cause of action that is frivolous or vexatious may be summarily disposed of on an application to strike out the pleadings or to stay or dismiss the cause."

And in 21 Enc. Pl. & Pr. 226, it is said:

"The 'irrelevant and redundant matter' of the codes is, generally speaking, analogous to the 'impertinence' of the chancery practice and 'surplusage' in pleading at law." And on page 228, in the same volume: "The word 'irrelevant' signifies not pertinent or applicable; not tending to support; and 'irrelevant matter' is usually defined as matter in a pleading which has no substantial relation to the question in controversy and can in no event affect the decision of the court."

So it is clear if the motion in this case is unnecessarily prolix, irrelevant or frivolous, the trial court did not err in striking it.

In determining whether the motion was of such character it is well to examine the statute providing the qualifications of jurors in the city court of Montgomery. Such qualifications are defined by local act of March 2, 1901, which, so far as it bears upon this point, is as follows:

"Sec. 3. Be it further enacted, That the board of jury commissioners of said county, at such annual meetings shall select from the male residents of the county, who have resided in said county for one year or more, over twenty-one and under sixty years of age, the names of all persons, not exempt from jury duty, as in their opinion are fit and competent to discharge the duties of grand and petit jurors with honesty, impartiality and intelligence ....."

It will be seen that the right to vote does not enter into the qualification of a person for jury service. Whether or not a person is qualified to vote is wholly irrelevant and immaterial in determining the question of his qualification as a juror. A bare reading of the motion to quash the indictment will disclose that it is both prolix and irrelevant. It contains much matter relating to the

suffrage provisions of the Constitution, and to the conduct of elections in the State, and other things, not in any way pertinent to the issue.

Respectfully submitted,

Massey Wilson,

Attorney General of Alabama.